

FCC MAIL SECTION

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 96M-173

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In re Applications of	)	WT DOCKET NO. 96-41	
LIBERTY CABLE CO., INC.	)		
For Private Operational Fixed	)	File Nos:	
Microwave Service Authorization	)	708777	WNTT370
and Modifications	)	708778, 713296	WNTM210
	)	708779	WNTM385
New York, New York	)	708780	WNTT555
	)	708781, 709426, 711937	WNTM212
	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)

O R D E R

Issued: July 9, 1996

; Released: July 11, 1996

On June 21, 1996, a Comment Of Time Warner Cable Of New York City And Paragon Cable Manhattan In Response To Proposal To Delay Decision To Allow Staff As Party To Make 308(b) Inquiry On The Motion To Enlarge was filed. On July 1, 1996, the Wireless Telecommunications Bureau's Reply was filed. Also on July 1, 1996, a Reply was filed by Bartholdi Cable Company, Inc. (formerly Liberty Cable Co., Inc. and referred to herein as "Liberty/Bartholdi"). Although the pleadings were not requested, they are informative and will be considered at this time under §1.294(d).

There is now under advisement a Motion To Enlarge Issues that was filed by Time Warner. The central issue is whether actual control of the licensed microwave facilities of Liberty/Bartholdi was retained after a purchase of its assets was completed. The Bureau has suggested in a pleading and on-the-record<sup>1</sup> that a decision on that Motion should be postponed pending an inquiry by the Bureau under Section 308(b) of the Communications Act.<sup>2</sup> The Bureau would focus

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<sup>1</sup> Bureau's Reply To Opposition To Motion To Enlarge Issues filed on June 4, 1996, and Prehearing Conference of June 13, 1996, at Tr. 194-204.

<sup>2</sup> The Bureau accurately reports in its Comment that it had previously made the suggestion to defer a ruling. At the conclusion of its Comment, the Bureau states that it would issue an inquiry under Section 308 within 10 days of a ruling that denied the Motion To Enlarge Issues. The Bureau may inquire about non-designated issues at its discretion so long as the inquiry is not disruptive to the hearing or prejudicial to the parties.

its inquiry on actual control of licensed facilities by the real party-in-interest. Time Warner argues that an investigation would be an unauthorized investigatory activity while the Bureau is a party to this adjudication.

Time Warner's argument is twofold: first, Section 308(b) and the discovery rules will not allow the Bureau to use its investigative authority because as a party to this case, the Bureau is not a decision maker; second, a Bureau inquiry under Section 308(b) and discovery under the Commission's rules are normally separate procedures for use under different circumstances. Time Warner cites the seemingly restrictive language of the statute:

[T]he Commission ---may require further written statements---  
to enable it to determine whether such original application  
should be granted or denied.

From this language Time Warner argues that the Bureau would not be making a "determination" in this proceeding and that therefore the use of Section 308(b) as suggested by the Bureau is an unauthorized procedure. Time Warner also argues that the Presiding Judge would not be able to exercise the same control as under the discovery rules and the Commission has delegated authority to its Administrative Law Judges in formal adjudication cases.

The Commission's rules delegate to Presiding Judges the power to regulate the course of hearings. 47 C.F.R. §1.243(f). Therefore, there is authority for permitting a related Section 308 inquiry to proceed while the case is in adjudication so long as there is no disruption caused to the proceeding and provided that no party is prejudiced. Time Warner and Cablevision are the only parties objecting. But neither of those parties would be the subject of the Section 308 inquiry.<sup>3</sup> Time Warner argues that its participation in discovery will be effectively cut off if the inquiry is permitted. But that argument begs the question. The addition of an issue must be made before any discovery is authorized. See Discovery Procedures, 11 F.C.C. 2d 185, 187 (1968) (discovery will not be permitted to search for an issue). There has not been an issue added. Therefore, unless and until an issue is added, there is no inconsistency or deprivation of rights that preclude a Bureau investigation of Freedom and Liberty/Bartholdi.

It is in light of Freedom's purchase of Liberty assets that the Bureau seeks information showing that Liberty/Bartholdi remains the real party-in-interest behind the more than 100 licenses which it holds. Thus, the Bureau's inquiry would involve more than just the 15 licenses at issue under the designation order in this case. The Bureau also notes that Freedom has applied

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<sup>3</sup> Time Warner cites the case of In re Application of Garrett, Andrews & Letezia, Inc., 88 F.C.C. 2d 620 (1981) wherein it was found to be error for the Review Board to receive additional evidence which the Board had obtained pursuant to Section 308 without affording parties the right to meet and rebut the evidence. In that case, the Board had sought and obtained additional affidavits that were favorable to the applicant from which they were sought. Opposing parties were not permitted an opportunity to rebut such self-serving evidence. That would not be permitted here. Before the Presiding Judge gives decisional weight to any evidence uncovered by the Bureau it will be made available for testing and rebutting by all parties to the proceeding.

for several licenses which would be adversely effected if Freedom were shown to have assumed unauthorized control over Liberty/Bartholdi licenses. The Bureau concludes:

If there has been any unauthorized assumption of control by Freedom of Liberty's licenses, then both Liberty's qualifications to continue to hold its licenses, and Freedom's qualifications to be granted licenses would be called into question.

The Bureau will determine after it concludes its Section 308 inquiry whether to use the information obtained in this proceeding. But whether used here or not, the Bureau need not await the termination of this case to inquire as to the identity of the real party-in-interest which actually controls licensed facilities. The Bureau's suggested procedure also seems to be the most efficient. There is an upcoming round of pleadings in connection with a Motion For Summary Decision. And so long as the record is open, and provided the conditions for considering a motion to enlarge issues are met, the information obtained by the Bureau under Section 308 may be considered in connection with the seeking of a real party-in-interest issue. In that regard, it is noted that there will be a sharing of the information obtained by the Bureau with Time Warner and Cablevision as long as this hearing is pending and the record is open.<sup>4</sup> Therefore, if the results of that inquiry are reported timely in pleadings which meet the requirements of Section 1.229, an appropriate issue may be requested by any party.

For the foregoing reasons, IT IS ORDERED that the Wireless Telecommunications Bureau MAY COMMENCE an inquiry under Section 308 of the Communications Act on the related questions of real party-in-interest and actual control of licensed facilities of Bartholdi Cable Company, Inc. (formerly Liberty Cable Co., Inc.).

IT IS FURTHER ORDERED that the Bureau MUST SUBMIT a written Status Report on its Section 308 inquiry by September 6, 1996.<sup>5</sup>

FEDERAL COMMUNICATIONS COMMISSION<sup>6</sup>



Richard L. Sippel  
Administrative Law Judge

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<sup>4</sup> The Bureau has represented that "Time Warner will be made a part of the investigation." Time Warner and Cablevision must be treated equally.

<sup>5</sup> Such Status Report should be submitted in camera with copies provided to counsel for all parties. It should indicate a statement of intention to seek an issue and present a suggested time frame for discovery, hearing dates, and closing of the record.

<sup>6</sup> Copies of this Order were faxed to counsel on date of issuance.